Supreme Court, U.S.
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No. 09-407

In The
Supreme Court of the United States

ANA M. ABREU-VELEZ, M.D., PH.D.,

Petitioner,

v.

THE BOARD OF REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA, THAT CREATED AND OPERATES THE MEDICAL COLLEGE OF GEORGIA; MEDICAL COLLEGE OF GEORGIA; AND DENNIS MARCUS, M.D., INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY UNDER COLOR OF LAW AS FORMER HEAD OF DEPARTMENT OF OPHTHALMOLOGY OF THE MEDICAL COLLEGE OF GEORGIA,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the district court abused its discretion when it determined that Petitioner's speech was that of a public employee acting within her job description while relying on *Pickering v. Board of Education,* 391 U.S. 563 (1968), and *Garcetti v. Ceballos,* 547 U.S. 410 (2006), which fail to include definitive standards by which to judge whether such statements were made pursuant to her "official duties."

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 1

I. STATEMENT OF THE FACTS 2

A. Introduction 2

B. Background 3

C. Dr. Abreu's Speech While Employed with the Department of Ophthalmology 4

D. Dr. Abreu's Post-Termination Speech ... 17

E. The District Court Order and the Eleventh Circuit's Opinion 20

II. REASONS FOR GRANTING THE PETITION 22

This Court should craft definitive and comprehensive standards by which a public employee's speech may be examined in the context of her job description, thereby expanding on the doctrine of *Pickering* and *Garcetti,* where the Court declined to do more than give a general framework for examining such speech, and which has enabled the public employer to obviate the need to defend claims of infringement of First Amendment

TABLE OF CONTENTS – Continued

Page

right of free speech with any more than a statement that the speech was part of the employee's official duties 22

A. The Standard for Testing a Public Employee's Speech 22

B. During her employment, Dr. Abreu was acting outside her official job duties when she reported her concerns with the Sleep Apnea Study and other studies conducted by Dr. Marcus 25

C. Dr. Abreu's interest in her speech can be shown to outweigh the interests of the Board of Regents and MCG in promoting the efficiency of the public service that MCG performed 29

D. Dr. Abreu's protected speech played a substantial role in MCG's decision to terminate her employment 30

III. CONCLUSION 31

APPENDIX

July 8, 2009 Opinion of the Court of Appeals for the Eleventh Circuit ..... App. 1

February 12, 2009 District Court Order Granting Defendants' Motion for Summary Judgment ..... App. 3

TABLE OF AUTHORITIES

Page

CASES

Abreu v. Board of Regents of the University System of Georgia, et al., WL 1950131 (C.A. 11 (Ga.)) 1

Andrist v. MCG, 128 S. Ct. 924 (2008) 28

Andrist v. MCG, 227 Fed. Appx. 884 (11th Cir. 2007) 28

Battle v. Board of Regents, 468 F.3d 755 (11th Cir. 2006) 28

Borison v. State, 680 S.E.2d 458 (2009) 7

Favors v. Alco Mfg. Co., 367 S.E.2d 328 (1988) 31

Garcetti v. Ceballos, 547 U.S. 410 (2006) ..... *passim*

Georgia Advocacy Office v. Borison, et al., 520 S.E.2d 701 (1999) 7

Kurtz v. Vickery, 855 F.2d 723 (11th Cir. 1988) 29

Morgan v. Ford, 6 F.3d 750 (11th Cir. 1993) 24

Morris. v. Crow, 142 F.3d 1379 (11th Cir. 1998) 24

Nero v. Hospital Authority of Wilkes County, 86 F.Supp.2d 1214 (11th Cir. 1998) 24

Pickering v. Board of Education, 391 U.S. 563 (1968) ..... *passim*

United States of America Ex. Rel. [Under Seal] v. [Under Seal], 05-CV-12115-RCL, United States District Court, District of Massachusetts 32

Vila v. Padron, 484 F.3d 1334 (11th Cir. 2007) 28

TABLE OF AUTHORITIES – Continued

Page

STATUTES

28 U.S.C. § 1254(1) 1
42 U.S.C. § 1983 ..... 2, 3, 22
U.S.C. Const. Amend. 1 ..... 1, 2, 22, 26

OPINIONS BELOW

The Eleventh Circuit Court of Appeals did not select its opinion for publication in the Federal Reporter. The unpublished decision is reported at 2009 WL 1950131 (C.A. 11 (Ga.)). The District Court entered its opinion Order on February 12, 2009, in Civil Action File No. CV105-186, United States District Court, Southern District of Georgia. The Opinions of both Courts are reprinted in the Appendix at App. 1 and App. 3.

JURISDICTION

The Eleventh Circuit filed its opinion on July 8, 2009. This Court has jurisdiction under 28 U.S.C. § 1254(1) to review the circuit court's decision on a writ of certiorari.

STATUTORY PROVISIONS INVOLVED

U.S.C. Const. Amend. 1

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and petition the Government for a redress of grievances.

42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

I. STATEMENT OF THE FACTS

A. Introduction

This case presents an issue which was decided by the district court below, and affirmed by the Eleventh Circuit Court of Appeals, which, Petitioner contends, is a question of federal law so important that the Supreme Court should review it, even absent any real conflict with existing law. The claims in this case arise out of a public employee's First Amendment rights and the need to have definitive standards in

place which require that a public employer, and any court reviewing its employment decision, look beyond the first blush of any answer to the question, "Did the speech concern the subject matter of the employee's job description?" Petitioner contends that the need to have such definitive standards for such inquiry is a matter of considerable national importance.

B. Background

Petitioner Ana M. Abreu-Velez, M.D., Ph.D. submits this petition for writ of certiorari after five (5) years of battling with the Medical College of Georgia (MCG), the Board of Regents of the University System of Georgia (BOR) and Dr. Dennis Marcus and the loss of her retirement savings and her home, in an attempt to secure justice for herself, her family, her friends, each one of the extremely well-qualified legal immigrants who came to the United States of America under the H1-B visa, every person in this country whose tax dollar has contributed to the research funds at U.S. universities and every person who has participated in terribly-regulated clinical trials.

In November 2004, Dr. Abreu was terminated from employment as a clinical trials coordinator and research associate with MCG in retaliation for exercising her right of free speech pursuant to 42 U.S.C. § 1983. Afterwards, MCG failed to hire her for another position in retaliation for her whistleblowing activities related to reporting the wrongdoing in

clinical trials by her supervisor, Dr. Dennis Marcus, to the Dean of the School of Medicine and to the President of MCG, who initiated an investigation into her allegations.

Dr. Abreu is a citizen of Colombia, where she was trained as a physician, holding a degree as a dermatologist, and also earned a Ph.D. in immunology. Dr. Abreu has three (3) post-doctoral fellowships obtained in the United States, the highest possible educational level in medicine and in science. Dr. Abreu is not licensed to practice medicine in the United States; however, her Ph.D. and three (3) post-doctoral fellowships are valid in the United States. Dr. Abreu worked at MCG pursuant to her H1-B visa status, permitting her to work in the field of medicine and biomedical sciences. Prior to working with Dr. Marcus, Dr. Abreu worked with other departments at MCG. She was first employed in 2001 with Drs. Andrew Mellor and David Munn in the Institute of Molecular Medicine and Genetics (IMMAG), and then, until June 30, 2004, with Dr. Wendy Bollag as an assistant research scientist in her laboratory.

C. Dr. Abreu's Speech While Employed with the Department of Ophthalmology.

Dr. Abreu applied for and was offered a position with Dr. Dennis Marcus in the Department of Ophthalmology (Department) as a clinical trials

compliance coordinator and research associate, commencing August 4, 2004. Her immediate supervisors were Dr. Marcus and Ms. Judy Hendrickson, optometrist. Ms. June Benson also had some supervisory authority over her job. Ms. Lori Mipro was the Administrator of the Department. Dr. Julian Nussbaum was the Director of the Department. The Department was well-funded and the recipient of many large grants.

Dr. Abreu's job duties, as listed on her Position Classification Form, included:

- Coordinate clinical trial research by preparing human assurance protocols and consents;
- Perform data entry in compliance with The Health Insurance Portability and Accountability Act (HIPAA), Good Clinical Practice (GCP), Institutional Review Board (IRB) and sponsor required guidelines;
- Act as patient liaison: Schedule appointments and track all aspects of clinical trials involvement;
- Assist with all patient exams as required by specified protocols;
- Certify in and assist with specialized paient diagnostic and therapeutic procedures;
- Certify in and perform specialized tasks and procedures;
- Obtain lab samples and prepare for analysis;

- Maintain equipment;
- Support and communicate appropriately with all medical staff;
- Compile new budgets and coordinate with MCG Grants and Contracts office;
- Track and report all budgets and spending monthly for all accounts; and
- Order supplies needed and necessary for patient care.

Dr. Abreu found the clinical trials files in serious disorder. While organizing the files, Dr. Abreu recognized a number of serious violations of protocol and GCP in the studies, including the Sleep Apnea Associated Retinopathy and Optic Neuropathy study (Sleep Apnea Study), which was completed prior to her employment with the Department. Dr. Abreu reported the problems she noted related to the Sleep Apnea Study and in 33 more studies to Dr. Marcus, to Ms. June Benson and to Ms. Judy Hendrickson. They ignored her. She also reported her concerns to the Office of Clinical Trials Compliance (OCTC). There, she learned that OCTC had already performed several audits of Dr. Marcus's studies and found noncompliance over the previous five (5) years.[1] Based on her report to them, OCTC initiated another audit.

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[1] It is noted that MCG regularly disregards regulations, procedures and even court orders, apparently in the interest of continuing its work. In 1998, Drs. Richard Borison and Bruce

(Continued on following page)

Dr. Abreu's decision to report the problems she noted with the Sleep Apnea Study (where 100 patients consent forms were not signed in a study of 100 participants) and other studies was based on her concern for the participants in the studies; the lack of integrity of the studies the reputation of MCG; the public's and various pharmaceutical companies' misplaced reliance on the studies and the lack of compliance with all types of federal regulations that were established to protect human subjects in clinical trials. Other than organizing the files, Dr. Abreu had no responsibility for the Sleep Apnea Study which had been completed before she was hired to work in the Department. Her day-to-day job duties related to current and active studies being performed by the Department.

Dr. Abreu talked to Dr. Marcus and Ms. Benson about conflicts of interest; funds being received by Dr. Marcus and Ms. Benson which they had not properly reported [constituting conflicts of interest prohibited by MCG, the State of Georgia and the Federal Drug Administration (FDA)]; her concerns about questionable budgets; inadequacies in the consent forms given to the study participants; failure to report side effects; severe unreported protocol violations; failures to properly report Severe Adverse Events (SAE); noncompliance in maintaining regulatory folders; serious

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Diamond were convicted of criminal activities related to clinical trials at MCG. *See Borison v. State*, 680 S.E.2d 458 (2009); *Georgia Advocacy Office v. Borison, et al.*, 520 S.E.2d 701 (1999).

accounting issues the failure to report bonuses and incentives for the study coordinator related to studies previously done and those being conducted at that time; and disregard of several Veterans Administration (VA) regulations. Dr. Abreu also revealed the fact that 12 patients in one clinical study at MCG suffered unreported Severe Adverse Events (SAE) and died (a horrifying violation of any GCP, which jeopardizes the clinical trials, especially when millions of dollars invested by tax payers and pharmaceutical companies are at risk). Because Dr. Marcus was ignoring her complaints, on numerous occasions and usually in private, Dr. Abreu informed Ms. Mipro, Department administrator, of her complaints and the violations found in the studies. As early as October 8, 2004, Dr. Abreu met with Dr. Julian Nussbaum, the Director of the Department, to make him aware of her complaints. Because of her complaints, Dr. Nussbaum instituted a weekly meeting each Friday at which Dr. Marcus, Ms. Judy Hendrickson, Ms. June Benson and Ms. Sandra Grubsia were to be in attendance. Dr. Marcus failed to attend these meetings.

Dr. Marcus was the responsible Principal Investigator (PI) for all 33 clinical trials being performed in the Department, as well as for the Sleep Apnea Study which was completed. As PI, all the following responsibilities, as prescribed by the regulations of the FDA, were obligatory for Dr. Marcus (Dr. Abreu revealed that, in over 10 years of performing clinical

trials at MCG, Dr. Marcus broke most, if not all, of these commitments.):

(1) Maintain the original protocol in the regulatory folder for each clinical study (sponsored and others) and subsequent amendments to include version dates and IRB approval dates as documented by IRB approval letter and Description of Research Proposal as well as the study specifics, which may include inclusion/exclusion criteria, age of study participants, length of study, medications, etc.

(2) IRB requested changes and clarifications letter (a/k/a Stipulation letter) and letter of response from the Principal Investigator (PI).

(3) Initial approval letter from IRB.

(4) Approval letters from other sites if applicable.

(5) Internal approvals such as Office of Clinical Investigative Services (OCIS); Health System Review Office (HSRO); Medical College of Georgia Health, Inc. (MCGHI); Information Technology (IT); Institutional Biosafety Committee (IBC); Institutional Chemical Committee (ICC) or Radiation Safety Committee (RSC), as applicable.

(6) Original Investigator's Brochure (Investigator's Drug Brochure, Clinical Investigator Brochure, Package Insert) and subsequent amendments to include version dates and IRB approval dates as documented by IRB approval letter.

(7) Original Informed Consent Documents (CD), Partner's Informed Consent Documents (PCD), Parental/Guardian Informed Consent Documents (P/GCD), and Children's Assent Documents (CAD) and subsequent amendments to include version dates and IRB approval dates.

(8) Nature and dates of all sponsor and non-sponsor amendments to the IRB approved protocol (e.g., changes in inclusion/exclusion criteria, study procedures, drug administration, research team members, etc.).

(9) Nature and dates of all Protocol Violations/Deviations.

(10) Form FDA 1572 and subsequent revisions.

(11) Lapses in the submission of the research protocol and investigator's requests for timely continuing review and approval by the IRB.

(12) Current list of personnel and delegated responsibilities on the appropriate form.

(13) Recruitment methods as described in the protocol and/or Description of Research Proposal.

(14) Signature and Responsibilities Log.

(15) Contact Information.

(16) Copies of Laboratory Certifications for all labs used in the protocol.

(17) Laboratory Normal Values for the study specific lab tests included in the protocol.

(18) Current Curriculum Vitae (CV) or resumé and Medical Licenses for Laboratory Directors.

(19) Current Curriculum Vitae (CV) or resumé for all research team members.

(20) A copy of the most current professional license(s) for the appropriate research team member(s) (e.g., medical, nursing, pharmacist, etc.).

(21) Documentation of completion of initial mandatory Web-based Clinical Research Education for all research team members and recertification, as applicable.

Dr. Abreu avers that the vast majority of government-supported studies should adhere to strict protocols and the highest ethical standards. Even one lapse is one too many. The American people expect clinical researchers to never compromise or neglect

the safety of human subjects. The moral and ethical reasons for paying heed to this demand require no explanation.[2]

The very players that handle misconduct in medical research are:

(1) The Department of Health and Human Services (HHS);

(2) The Office of Human Research Protections (OHRP);

(3) The Office of the Inspector General of the Department of Health and Human Services (OIG);

(4) Enforcement agencies; and

(5) Institutional Review Boards (IRB's).

Dr. Abreu avers that IRB's established to protect the rights and welfare of human research subjects have to ensure that conflicts of interest do not interfere with the ethical conduct of medical research. Private, commercial IRB's, which are increasingly used, are themselves affected by a structural conflict of interest. Current guidelines and regulations lack

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[2] Unfortunately, the public's confidence in all these matters has been seriously shaken by the death of 18-year-old Jesse Gelsinger in a gene-transfer trial at the University of Pennsylvania in which human subjects were not adequately protected and which presented the appearance of substantial financial conflicts of interests. Moreover, this young man's death led to the discovery by the National Institute of Health (NIH) of many hundreds of unreported severe adverse events (SAE).

adequate conflict-of-interest rules and provide insufficient details on the substantive rules. IRB's are similar to administrative courts and tribunals, and, therefore, administrative laws on "bias" are applied, which has always viewed financial conflicts of interest severely. The structure of private review boards would appear to be a breach of a core principal of administrative law and procedural justice.[3]

MCG has violated the Government Accountability Act for over 14 years. Dr. Abreu showed this, and MCG's violations of regulations of other agencies [Office of the Inspector General (OIG); Department of Health and Human Services (DHHS); Office of Inspector General Act of 1978, which audits the NIH funds; Office of Research Integrity (ORI); Office of Human Research Protection (OHRP) and many other federal agencies] over and over with evidence in the District Court.

In mid-November, Dr. Marcus and Ms. Benson made a decision to schedule a training session with Theragenics, Inc., a sponsor for one of the Department's clinical trials (Theragenics training session). In preparation for the Theragenics training session, Dr. Abreu, as well as others, had concerns related to protocol and procedures for outside visitors to the operating room. A meeting was scheduled with

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[3] *See* Angell, M., *"Is Academic Medicine for Sale?"* N. Engl. J. Med., 342(20) at 1516-8 (2000); Shalala, N. Engl. J. Med., 343(11) at 808-10 (Sept. 2000); http://www.gateway2ovid.com-80/u.

various employees to discuss the concerns about the Theragenics training session, and Dr. Marcus directed Dr. Abreu to attend. The minutes of the meeting included a list of questions and concerns, mostly related to procedure for the delivery of the articulating arm to the Operating Room (OR); laboratory studies required to be performed on patients; the recovery process and the decontamination procedure. Dr. Abreu and the other seven (7) members of the committee opposed the Theragenics training session because of the lack of preparation by MCG at all levels, to-wit: lack of protection from exposure of pregnant nurses to radiation in the OR; lack of any pre-anesthetic preparation for the subject of the human study; lack of preparation in the disinfection of the medical device to be used in the surgery; lack of preparation and permits for the disposal of the radiation device to be used in the intraocular braquitherapy surgery and lack of clearance for radiation safety to dispose of the rest of the radioactive materials (being at an orange national security level).

Dr. Abreu sent a memorandum with the minutes of the committee meeting stating the committee's opposition to the unprepared and reckless Theragenics training session and stated in the e-mail that she would not allow any human to be exposed to any unnecessary surgical and radiotherapy risk based on the lack of compliance with medical and FDA regulations. In her memorandum, Dr. Abreu cited the exact phrase, "will you allow that either of your

parents to be the subjects of this unprepared surgical and radiotherapy study and risk their life's [sic]?"

The theragenics training session was ultimately canceled, but Dr. Marcus acted in anger towards Dr. Abreu and wrongfully blamed her for the cancellation. Dr. Abreu clearly acted as a citizen since she did not follow the reckless instructions of her supervisor, Dr. Dennis Marcus, by continuing with the Theragenics training session.

Dr. Abreu was terminated from employment effective November 22, 2004, because of Dr. Marcus' retaliation against her for her complaints to him and her other supervisors, to the administrator of the Department, to the Director of the Department and to other departments at MCG. Her separation notice, however, stated no reason for the termination other than that she had "failed to satisfactorily complete the provisional period" of her employment.

During his deposition in this case and by Affidavit, Dr. Marcus insisted that he had no knowledge of Dr. Abreu's complaints while she was employed in his Department and that he fired her because he found that it was not productive for him to work with her. Also, in defense of the lawsuit filed by Dr. Abreu, BOR and MCG relied on their broad interpretation of her job duties, namely that she was in fact responsible for the studies, including the Sleep Apnea Study, and it was her job to report any problems which she found in any study. Dr. Abreu contends that this interpretation seriously strains the

language of the Position Classification Form, which is stated in "present" tense. Further, Dr. Marcus was the PI in each study and had ultimate responsibility and decision-making power. MCG pointed out, in the court below, that, based on what Dr. Abreu revealed about the Sleep Apnea Study, the study could not be published.[4]

Following her termination, Dr. Marcus "resigned" and left MCG, and his file notes that it is not recommended that he be rehired. All of those persons working in the Department with Dr. Marcus and on his clinical trials while Dr. Abreu was employed there also suddenly "resigned," including Ms. June Benson (Junior clinical trials coordinator); Ms. Sandra Grubsia (clinical coordinator) (These two women coordinated 33 clinical studies enrolling more than 300 patients, and both women have only high school diplomas.); Ms. Judy Hendrickson (optometrist); Ms. Melanie Jones (secretary); and Ms. Elizabeth Price (a "nurse" without credentials). None of the

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[4] The Sleep Apnea Study was published notwithstanding this statement. It was reported in J. Glaucoma, 10(3) at 177-83 (Jun. 2000), and J. Neuroophthalmol. 121(2) at 121-3 (Jun. 2001). Further, other studies which were not to be published by Dr. Marcus were published. *See* Oral Moxifloxacilin Study where none of the patients had signed consents, and it was therefore forbidden to be published. Retina, 28(3) at 473-6 (Mar. 2008); and Am. J. Ophthalmol., 143(2) at 338-40 (Feb. 2007); Epub. (Oct. 23, 2006).

people working under Dr. Marcus while Dr. Abreu was working in the Department remain.[5]

IV. Dr. Abreu's Post-Termination Speech.

Following termination, Dr. Abreu was told to work with Mr. Andrew Newton, the university's Vice President of Legal Affairs, in an attempt to make all her complaints known to MCG and so that MCG could retrieve copies of the evidence that Dr. Abreu had collected during her job, which evidence showed that these problems in clinical trials and terrible practice of failing to follow regulations promulgated by the appropriate agencies had occurred over a period of almost 10 years, long before Dr. Abreu was hired.[6]

Mr. Abreu clearly demonstrated to the lower courts that all MCG's regulatory committees in clinical trials were aware for more than five (5) years of the noncompliance in Dr. Marcus' clinical trials. This was shown by the testimony of the lead auditor in OCTC, Ms. Bridgette Taylor, and her letters to MCG's President; to the Vice President of Legal

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[5] Dr. Marcus continues with his misrepresentations. His professional website states that he has been a clinical professor of ophthalmology at the University of South Carolina in Columbia, South Carolina, a complete falsity.

[6] Interestingly, a case similar to Dr. Abreu's is being investigated by Senator Grassley against Emory University and Dr. Charles Nemeroff. *See* http://www.ajc.com/printedition/content/printedition/days/index.html.

Affairs; to the Director of IRB; to the Dean of the School of Medicine; to the Director of the Offices of Grants and Contracts; to ICC; to the Vice President of Research; to the Director of the Ethics Committee; to the Director of Clinical Trials Compliance at the VA; and to the HSRO. Dr. Abreu contends that these committees ignored the noncompliance issues because 43% of all grants and clinical trials money goes to the administrative costs and contributes vastly to the high salaries of the persons in these positions. Further, Dr. Abreu was directed to work with Mr. Philip MacGuire as a mediator.

During the months in which she worked with the Vice President of Legal Affairs, Mr. Andrew Newton, and Mr. Philip MacGuire, Dr. Abreu provided them with evidence of the wrongdoings in clinical trials, problems in the management of clinical trials and with detailed examples and memoranda on how to correct the problems in the clinical trials at MCG. In good faith, Dr. Abreu offered her services to assist in cleaning up the clinical trials. Ultimately, these materials, which she considered her intellectual property, were adopted by MCG and are being used today in an effort to correct the problems Dr. Abreu identified.[7] In fact, since Dr. Abreu's termination and her exposure of the serious problems occurring since 1997 with the clinical trials, MCG has hired more

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[7] Dr. Abreu did not assert a claim for theft of her intellectual property in this case but others have asserted such claims against MCG.

than 65 people with proper training to ensure the quality of the clinical trials, and MCG has changed 985 of the entire rules in clinical trials.[8]

Dr. Abreu was told by officials at MCG that she was free to apply for other jobs there and made applications for employment for over 130 jobs at MCG. Evidence of the positions applied for and the applications were in the record as exhibits to her deposition. Dr. Abreu was not offered any position at MCG and ceased her efforts to find a job at MCG in the latter part of the summer of 2005 because her H1-B visa was canceled by the university. After eight (8) months, with no salary or unemployment compensation, and after providing the evidence to the bogus mediator, Mr. MacGuire, Dr. Abreu's and her minor daughter's visas were canceled by MCG.

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[8] Since Dr. Abreu's termination, the president of MCG; the Vice President of Research and Ethics, Dr. Matthew Kluger; the Dean of the School of Medicine, Dr. David Stern; and the Director of the Physician Practice Group (PPG), Dr. Steinhart, all have left or are leaving MCG. All "resigned" after Dr. Abreu sent volumes of evidence to several federal regulatory agencies, including the Federal Bureau of Investigation (FBI), about the wrongdoings in clinical trials at MCG and showing that top directors were laundering money, sending the majority of the money collected in clinical trials by Dr. Marcus to residual accounts that, at that time, were non-auditable, and then transferring the funds to the accounts of the MCG Foundation (MCGF). From there, the funds were transferred to accounts of ghost companies such as Jurassic Donkey, Incorporated and MCG Insurance to the Cayman Islands. After Dr. Abreu revealed these activities, MCGF was forced to be dissolved. More than 40 people have left MCG because of this issue.

After she ceased making job applications, Dr. Abreu contacted numerous federal, state and local agencies (and the police, after her daughter, her car, her home and her current job were attacked more than 13 times) in an attempt to make known to these agencies the illegal and inappropriate activities of Dr. Marcus, the Department and MCG. Because she was no longer making job applications, the District Court found that she had no claim for retaliation related to those activities, and her appeal to the Eleventh Circuit Court of Appeals did not pursue that claim.

E. The District Court Order and the Eleventh Circuit's Opinion.

The District Court issued an opinion which failed to properly examine the context of Dr. Abreu's pre-termination speech and to consider the importance of the subject. The District Court condoned MCG's shallow attempt to examine her speech and its insistence that the speech was nothing more than a part of her job responsibilities. The Order fails completely to pass muster as an impartial review of the speech and actions of Dr. Abreu in light of their importance and the importance of the subject matter, i.e., how clinical trials were being handled at MCG and the fact that the manner in which they were handled endangered the lives of the participants and contaminated the results of the various studies.

The District Court set about its handling of this case in a way that can only be described as *not* even-handed. While it was shown by Dr. Abreu that MCG and Dr. Marcus forged documents, the District Court chose to find that MCG and Dr. Marcus were credible in that it actually accepted Dr. Marcus' statement that he was not aware of Dr. Abreu's complaints, a finding very hard to believe under the facts of this case. Further, the District Court failed to compel MCG to provide critical documents requested in the discovery process and further granted a motion for protective order disallowing the deposition of the Chancellor of the BOR.

The Eleventh Circuit Court of Appeals compounded this glossing over of the issues by refusing to take Dr. Abreu seriously at all, which is evidenced by its refusal to hear the matter *en banc*; issuing a succinct opinion which merely adopted the findings of the district court; failing to grant oral argument; denial of Dr. Abreu's motion to supplement the record excerpts; a quickly issued opinion for a case which was initiated in 2004 and included more than 7,000 pages of documents and evidence and, finally, the denial of Dr. Abreu's Motion for Stay of Mandate Pursuant to Rule 41 (This, in particular, is perplexing. The Court of Appeals is clearly determined to admonish Dr. Abreu for pursuing her appellate rights.). Adding to the indignity of this apparent lack of respect for her claims by the Court of Appeals, now BOR has made several attempts to collect the

Judgment on the Bill of Costs in this case totaling more than $11,000!

The Court of Appeals also refused to find that District Court Judge J. Randall Hall should have recused himself based on the multiple conflicts of interest revealed by a search of the public records. Judge Hall took the case on a reassignment from Judge Dudley Bowen, well after the proceedings were underway.

II. REASONS FOR GRANTING THE PETITION

This Court should craft definitive and comprehensive standards by which a public employee's speech may be examined in the context of her job description, thereby expanding on the doctrine of *Pickering* and *Garcetti*, where the Court declined to do more than give a general framework for examining such speech, and which has enabled the public employer to obviate the need to defend claims of infringement of First Amendment right of free speech with any more than a statement that the speech was part of the employee's official duties.

A. The Standard for Testing a Public Employee's Speech

This Court has established the test for the review of a § 1983 claim against a public employer for violation of the employee's First Amendment right to

freedom of speech in *Pickering v. Board of Education,* 391 U.S. 563 (1968), and *Garcetti v. Ceballos,* 547 U.S. 410 (2006). The test includes:

(1)(a) The district court must first determine whether the employee's speech was made as part of her official job duties; or (b) may be fairly characterized as constituting speech as a citizen on a matter of public concern.

(2) Then, if the speech addresses a matter of public concern, the district court then applies a balancing test, weighing the employee's free speech interests against the interest of the state, as an employer, in promoting the efficiency of the public service it performs.

(3) If the employee prevails on the balancing test, the district court determines whether the employee's speech was a substantial motivating factor in the state's employment action.

(4) Finally, if the employee prevails by showing the speech was a substantial motivating factor in the state's employment decision, the state must prove by a preponderance of the evidence that it would have reached the same decision even in the absence of the protected activity.

In determining whether the employee's speech may be fairly characterized as constituting speech on a matter of public concern, the court must examine the content, form and context of the employee's speech. *Pickering, supra.* Not only must the speech be

related to matters of public interest, but the purpose of the expression must be to present such issues as matters of "public" concern. *Id.* at 574.

The employee need not publish the matter to the public to touch on public concern; the employee's motivation and her efforts to communicate the concerns to the public are relevant inquiries. *Nero v. Hospital Authority of Wilkes County,* 86 F.Supp.2d 1214, 1224 (11th Cir. 1998).

Almost anything occurring in a public hospital could be of concern to the public, so the focus is not on the subject matter of the speech. Instead, the inquiry is "whether the speech at issue was made primarily in the employee's role as a citizen, or primarily in the role of employee." *Id.,* citing *Morris v. Crow,* 142 F.3d 1379, 1382 (11th Cir. 1998) (quoting *Morgan v. Ford,* 6 F.3d 750, 755 (11th Cir. 1993)).

To dispense with whether or not Dr. Abreu's speech related to matters of public concern, the Eleventh Circuit Court of Appeals has held that almost anything that happens in a hospital is a matter of public concern. Nero, *supra*. Accordingly, we will turn to an analysis of the other elements of the test.

B. During her employment, Dr. Abreu was acting outside her official job duties when she reported her concerns with the Sleep Apnea Study and other studies conducted by Dr. Marcus.

The BOR, the MCG and Dr. Marcus contend that Dr. Abreu's speech was all pursuant to her official duties. It has already been shown that Dr. Abreu's job description contains broad statements concerning her role with the clinical trials and the patients; however, all the duties listed relate to *current, active* studies by the very wording of those descriptions, i.e., "prepare" human assurance protocols and consents; "act" as patient liaison; "assist" with patient exams; "assisting" with procedures; "assist" with patient diagnostic procedures; "perform" refractions on patients and "obtain" lab samples, all implies working with current patients. The only duty listed in her job description which could possibly be interpreted as being related to a completed study is that of data entry in compliance with HIPAA, GCP, IRB and sponsor required guidelines.

Dr. Marcus was the responsible Principal Investigator (PI) for the Sleep Apnea Study. While Dr. Abreu may have ultimately entered data, or was responsible for entering data related to this study, she was not responsible for any other aspects of the study while the study was being performed on actual patients. The District Court and the Eleventh Circuit, which declined to write an opinion which digested the facts and allegations but adopted the reasoning of the

District Court, failed to understand this important distinction.

Admittedly, within her role as clinical trials coordinator, Dr. Abreu was duty-bound to inform Dr. Marcus of the problems she recognized in the study. That is where Dr. Abreu's "official" job duties ceased. Reporting the problems to OCTC or the Department Head, Dr. Nussbaum, was not within her job description. Dr. Marcus left her no choice; as a physician and healer, Dr. Abreu felt it her civic duty to lobby the Head of the Department and others in the chain of command if necessary, to bring these serious violations in the clinical trials to light.

The *Pickering* Court refrained from setting standards to judge such statements, but did look at general lines along which such an analysis should run, to-wit: (1) would the statements have an effect on the actual operations of the [hospital]; and (2) is the matter raised by the employee a matter of public concern? *Pickering* at 572-573.

In *Garcetti,* the Court found that, in determining whether the speech is protected, the fact that the speech concerns the subject matter of the employee's employment is nondispositive. The First Amendment protects some expressions related to the public employee's job. *Garcetti* at 417.

Justice Souter, in his dissent in *Garcetti,* discusses the need for standards to be put in place to assist in examining the employee's speech if it is debatable that it could arise out of an employee's job

duties. The Court must account for the "undoubted value of speech to those, and by those, whose specific public job responsibilities bring them face to face with wrongdoing and incompetence in government, who refuse to avert their eyes and shut their mouths." *Garcetti* at 434. If the only reason to suppress the speech is to protect the government's huge interest in managing its employees and promote the efficiency of its operations, then the Courts must institute standards which stress the importance attached to the speech. *Id.*

Justice Souter suggests that, because of the work in which the government entity may be engaged, any standard should hold from the outset that an employee speaking on subjects in the course of her duties should not prevail on balance unless she speaks on a matter of unusual importance. He also suggests that circuits which have recognized claims such as Ceballos' would not have a flood of litigation on these type claims if his view concerning the importance of the speech is a recognized component of the inquiry into the public employee's speech. *Id.* at 435-436.

The Eleventh Circuit, in particular, has continued to diminish the free speech rights of public employees, relying on *Garcetti,* where the Supreme Court ruled that Ceballos, a district attorney, in questioning the validity of a search warrant in a particular case he was handling, and was thereafter subjected to retaliatory acts by his employer, was not engaged in free speech but made the statements

pursuant to his official job duties. Recently, in *Vila v. Padron,* 484 F.3d 1334 (11th Cir. 2007), the Circuit Court affirmed the District Court's dismissal of Vila's case on motion for summary judgment. Vila had raised legal and ethical concerns about several matters which came to her attention while performing her job duties as Vice President of External Affairs. The Circuit Court found that Vila was clearly acting within her job duties and no discussion of the importance of her speech played a part in that decision.

In *Battle v. Board of Regents,* 468 F.3d 755 (11th Cir. 2006), Lillie Battle had the responsibility of verifying the completion and accuracy of student files, and, in the course of her job duties, found fraudulent activity and reported the activity to her supervisor and the University President. Later, Battle's contract was not renewed, and she sued. Again, the District Court dismissed the case on motion for summary judgment, and the Eleventh Circuit affirmed the decision on the basis that it could only be characterized as a public employee speaking in the fulfillment of her job duties. *Id.*

A similar result was found by the Eleventh Circuit in *Andrist v. MCG,* 227 Fed. Appx. 884 (11th Cir. 2007). Andrist sued his employer for retaliation after he revealed fraud, waste and abuse of public funds in the operations of the hospital. The Court denied his petition for review. *Andrist v. MCG,* 128 S. Ct. 924 (2008).

Dr. Abreu contends that the *Garcetti* holding allows the Courts to continue to diminish the rights of its public employees, mostly by using a very broad and ambiguous job description. In this case, the Court has an opportunity to set definitive and comprehensive standards by which to examine the importance of the speech, thereby making it an essential element of the review of any claim of a violation of the public employee's right of free speech.

C. Dr. Abreu's interest in her speech can be shown to outweigh the interests of the Board of Regents and MCG in promoting the efficiency of the public service that MCG performed.

Having made the threshold showing that the speech at issue relates to a matter of public concern, Dr. Abreu must show that the speech is accorded protection under the *Pickering* balancing test. *Kurtz v. Vickery,* 855 F.2d 723 (11th Cir. 1988). The employee's interest in making the protected speech must be balanced against the interest of the state, as employer, in promoting the efficiency of the public service it performs. *Id.* at 730.

In the instant case, the public service performed by MCG is that of a public hospital which engages in treating patients and in performing various studies and clinical trials under federal guidelines. If there is even the remotest possibility that the research is flawed or affected by research misconduct, as is

contended by Dr. Abreu, then the function performed by the public hospital cannot be relied on by the public or the pharmaceutical companies which sponsor the trials. The result then is that her interests in the speech outweigh MCG's interest in continuing these studies without interference or further audit.

The outcome of the *Pickering* balancing test determines whether the public employer's interests override the employee's interests in the protected speech. The balancing process is an issue at law. *Id.* at 732. If the court determines that Dr. Abreu's interest in her speech outweighed those of MCG, then the causation issues must be resolved by the jury. *Id.* at 734.

D. Dr. Abreu's protected speech played a substantial role in MCG's decision to terminate her employment.

MCG and BOR have contended that, even if it is determined to be protected speech, the protected speech did not play a substantial role in the decision to terminate Dr. Abreu's employment as required by the *Garcetti/Pickering* test. This entire argument hinges on the disingenuous and disputed contention that Dr. Marcus had no knowledge of Dr. Abreu's allegations concerning the research misconduct at the time he decided to terminate her employment. By virtue of her repeated attempts to have Dr. Marcus' superiors address her concerns, Dr. Marcus can be shown to have constructive knowledge of her

protected speech. The standard is whether an employer, in the exercise of reasonable care, should have known of an employee's misconduct. *Favors v. Alco Mfg. Co.*, 367 S.E.2d 328 (1988).

If it is determined that the protected speech played a substantial role in the employer's decision to terminate the employee's employment, then it should be determined whether the same decision would have been reached even without the existence of the protected activity. MCG and Dr. Marcus went to extraordinary lengths in the court below to make a case that Dr. Abreu was not capable of handling her job responsibilities. This is a fabricated excuse to defend Dr. Abreu's claims, and Dr. Abreu respectfully suggests to the Court that this finding by the District Court should be ignored as a red herring.

III. CONCLUSION

This case is of national importance in light of the current situation about the implementation of a health care system that is one-sixth (1/6th) of the entire United States budget because the case examines the prevailing corruption in the medical universities and hospitals which are defrauding the U.S. government and U.S. citizens by abusing their tax exempt status. Also, the case clearly shows the dirty, reckless conduct of a medical team allowing the unnecessary deaths of 12 patients in one clinical trial

so that they can remain tight with the pharmaceutical industry.

Because of her insistence in her right to free speech and her whistleblowing activities, Dr. Abreu has suffered multiple attacks against her, her property and her daughter. This is an example of how persons who insist on such rights and persons who act as whistleblowers against these large corporations and public employers are the victims of white collar criminals.[9]

Dr. Abreu avers that this case may be an example of why the current U.S. government is searching for a fair medical system for all Americans, one not based on bribes, kickbacks, personal interest or ties with the pharmaceutical companies which enrich unethical doctors and administrators and betray millions of people who pay taxes or who are jobless. The case shows how teaching hospitals and universities are "white elephants" defrauding the U.S. government, the people of this country and the patients in clinical trials and affecting the U.S. economy.

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[9] Just in the last few days, national attention has been brought to how a whistleblower must endure long years of fight in an effort to bring injustice to light. *See United States of America, Ex. Rel. [Under Seal] v. [Under Seal],* 05-CV-12115-RCL, United States District Court, District of Massachusetts, in which former sales representative for Pfizer, Inc., John Kopchinski, filed a *qui tam* lawsuit, resulting in Pfizer's agreement to pay a huge settlement and criminal penalty.

Dr. Abreu believes that, because most academic and medical universities are tax exempt at both the federal and state levels, activities such as money laundering and defrauding the federal government support all the more why this Honorable Court should take this opportunity to formulate definitive standards for reviewing a public employee's speech. Importantly, this case should get national attention which would obligate the regulatory agencies to propose changes in order that universities really fulfill their role to serve society, not to abuse the tax exemptions given to them, especially in such dire economic times and when our health system is jeopardized. This case needs to be heard by the Supreme Court in order to establish a precedent in all lower courts that may change the history of nonprofit health organizations in the U.S.

Respectfully submitted,

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[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 09-11365
Non-Argument Calendar

D.C. Docket No. 05-00186-CV-1

ANA M. ABREU-VELEZ,

Plaintiff-Appellant,

versus

BOARD OF REGENTS OF THE UNIVERSITY SYSTEM OF GA, MEDICAL COLLEGE OF GEORGIA, DENNIS MARCUS, M.D.,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Georgia

(July 8, 2009)

Before: TJOFLAT, BIRCH and HULL, Circuit Judges.

PER CURIAM:

The district court granted appellees summary judgment on appellant's claims, brought under 42 U.S.C. § 1983, that (1) her employment was

terminated at the Medical College of Georgia (MCG) in retaliation for her exercise of speech – specifically, for voicing concerns about appellee Marcus's clinical trials – and (2) MCG refused to employ her for any number of the 130 jobs she applied for, and was qualified, in retaliation for the complaints she had made following her termination. After granting appellees summary judgment, the district court declined to exercise supplemental jurisdiction over appellant's whistleblower claim under state law and accordingly dismissed it without prejudice.

Appellant now appeals, contending that the district court erred in several respects in granting summary judgment. She also contends that the court should have recused. We agree with the district court, for the reasons stated in its February 12, 2009 order granting summary judgment, that appellant's § 1983 claims of retaliation are meritless. As for appellant's recusal argument, we note that appellant did not move the district court to recuse while the case was pending before the court. She therefore asks, in effect, that we conclude that the court's refusal to recuse *sua sponte* amounted to plain error. We decline her request.

The judgment of the district court is

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA AUGUSTA DIVISION

ANA M. ABREU-VELEZ, M.D., Ph.D.,	*	
Plaintiff,	*	
BOARD OF REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA, that created and operates the Medical College of Georgia, MEDICAL COLLEGE OF GEORGIA, and DENNIS MARCUS, M.D., individually and in his official capacity under color of law as former head of Department of Ophthalmology of the Medical College of Georgia,	*	CV 105-186
Defendants.	*	

ORDER

Plaintiff Ana M. Abreu-Velez, M.D. filed the captioned case bringing claims under 42 U.S.C. § 1983 ("§ 1983") and the Georgia Whistleblower Act, O.C.G.A. § 45-1-4 (2004), asserting that Defendants retaliated against her for exercising her First Amendment right of free speech by unlawfully terminating her and refusing to rehire her for a number of jobs. This matter comes before the Court pursuant to

Defendants' Motion for Summary Judgment under Federal Rule of Civil Procedure 56(c). (Doc. no. 43.) Upon consideration of the record evidence, the briefs submitted by counsel, and the relevant law, Defendants' motion is **GRANTED** for the reasons stated below.

I. BACKGROUND

Plaintiff's § 1983 claim against Defendants stems from her employment in the Department of Ophthalmology at Medical College of Georgia ("MCG") from August 4, 2004 to November 22, 2004. The Court notes that Plaintiff brings a First Amendment retaliation claim. Thus, the Court will concern itself with Plaintiff's speech while she was an employee at MCG and shortly thereafter. Plaintiff makes a litany of allegations against MCG including, but not limited to: a pattern of misconduct in clinical trials; MCG employees receiving illicit funds through conducting clinical trials; endangerment of human lives during these clinical trials; orchestrating physical attacks on Plaintiff's daughter; bribing Plaintiff's former attorney; money laundering through false bankruptcies; tax evasion; as well as violations of the Patriot Act. The Court makes clear at the outset that Plaintiff's unsubstantiated allegations of past and present wrongdoing against MCG are simply not relevant in determining whether Dr. Marcus and other officials at MCG fired Plaintiff in retaliation for exercising her First Amendment rights, or continued to retaliate against her after her termination.

A. Plaintiff's Employment with Dr. Marcus at the Department of Ophthalmology

i. Plaintiff's Work History

Plaintiff is a citizen of Colombia, South America, where she was trained as a medical doctor. Plaintiff holds a degree in dermatology and a Ph.D. in immunology. (Pl. Dep. at 20-26.) Plaintiff worked at the University of Antioquia Medical School in Colombia until she was fired in February 2001, allegedly for revealing fraud at the university. (*Id.* at 64-70; Pl. Dep. Ex. 1.)

In October 2001, Plaintiff was initially hired at MCG as a Post Doctoral Fellow, working for Drs. Mellor and Munn at the Institute of Molecular Medicine and Genetics. Plaintiff stayed at this position until March 2002, when she was transferred to another laboratory. (*Id.* at 39-41.) Plaintiff alleges that she was transferred to this position because she "showed misconduct in research performed by Dr. Andrew Mellor and David Munn."[1] (*Id.* at 39.)

Next, Plaintiff was transferred to work under Dr. Wendy Bollag as an Assistant Research Scientist. (Pl. Dep. Ex. 1.) Plaintiff worked in that capacity until June 30, 2004, when her contract was not renewed because Dr. Bollag did not receive a grant to reemploy her. (Pl. Dep. at 44-46.)

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[1] Plaintiff's current suit does not involve allegations against Drs. Mellors [sic] and Munn.

ii. Plaintiff's Job Responsibilities

Plaintiff was hired to work as a research associate in the Department of Ophthalmology at MCG on August 4, 2004. (Pl. Dep. Ex. 5.) Specifically, Plaintiff was employed as a clinical trials compliance coordinator and research associate. (Aff. of Pl. ¶ 7.) Plaintiff worked for Dr. Marcus, who at the time was the head of the Department of Ophthalmology. (Marcus Dep. at 75; Aff. of Marcus ¶¶ 13-14.) Dr. Marcus was Plaintiff's direct supervisor. (*Id.*) Plaintiff was also supervised by Dr. Judy Hendrickson, another faculty member in the department, as well as Ms. June Benson, the senior clinical coordinator. (*Id.* ¶ 9.)

The Department of Ophthalmology conducts many clinical research trials. Plaintiff was hired to help Dr. Marcus conduct his trials in compliance with record keeping and reporting requirements. (Pl. Dep. at 77-89; Aff. of Marcus at ¶¶ 15-17). Plaintiff's primary job responsibility was to "coordinate clinical trial research and perform all aspects of patient care related to specific trials." (Pl. Dep. Ex. 7.) Specifically, Plaintiff's written job duties included: coordinating clinical trial research by preparing human assurance protocols and consents; performing data entry in compliance with various federal laws and sponsor-required guidelines; acting as a patient liaison; certifying and assisting with specialized patient diagnostic and therapeutic procedures; supporting and communicating appropriately with all medical staff; compiling new budgets, including coordination with MCG Grants and Contracts office; and tracking

and reporting all budgets and spending. (*Id.*; Pl. Dep. at 95-103)

Plaintiff had more specific duties as well. In Plaintiff's own words, she "ke[pt] the books, No. 1." (Pl. Dep. at 78.) Plaintiff was responsible for maintaining the regulatory folders, including patient consent forms and other mandatory documents required for conducting clinical research trials. (*Id.*; Marcus Dep. at 39, 62-63, 70-71, 86.)

Plaintiff testifies that protecting the safety of the people used in clinical trials was an important part of her position. Plaintiff was required to communicate with the Institutional Review Board that protects human subjects used in clinical trials. (Pl. Dep. at 79.) Plaintiff also worked with the Human Assurances Committee to ensure the safety of humans being used in the clinical trials. (*Id.* at 97.) Plaintiff testified that it was "absolutely" part of her job duties to "protect humans used in the clinical trials." (*Id.* at 84.)

iii. Plaintiff's Internal Complaints During Her Tenure

When Plaintiff began to work for Dr. Marcus, she was dismayed to find that the clinical trials files were in serious disorder. (Aff. of Pl. ¶ 10; Marcus Dep. at 62-63.) Specifically, Plaintiff recognized a number of serious violations of good clinical practices in various studies. (Aff. of Pl. ¶ 10.) For instance, Plaintiff found that in Dr. Marcus's Sleep Apnea study, almost

one-hundred patients had not signed the proper informed consent paperwork. (*Id.* ¶ 15.) In another study sponsored by Eli Lilly, Plaintiff found evidence that some patients had suffered severe reactions and adverse events ("SAEs") during clinical trials and that these SAEs had gone unreported. (*Id.*)

Based on her concerns, Plaintiff first reported these violations to Dr. Marcus, to Benson, and to Dr. Hendrickson. (*Id.* ¶ 12.) In Plaintiff's own words, she talked to Dr. Marcus about the following problems: conflicts of interest, questionable budgets, inadequacies in the consent forms given to study participants, as well as failure to report severe adverse events, serious accounting issues, non-compliance in maintaining regulatory folders, and failure to report bonuses and incentives for the studies. (*Id.* ¶ 19.) Plaintiff contends that both Benson and Dr. Marcus reacted in anger to her concerns. (*Id.*)

When Plaintiff was unsatisfied with their inaction, she reported her concerns to the Office of Clinical Trials Compliance ("OCTC"). (*Id.* ¶ 15.) The Office of Clinical Trials has the authority to conduct audits of clinical research trials at MCG. (Dep. of Taylor at 17.) Based on Plaintiff's concerns, Bridgett Taylor, a clinical trials auditor, conducted an audit of Dr. Marcus's Sleep Apnea study. (*Id.* at 21.) Specifically, Taylor was concerned about the informed consent forms missing from the study. (*Id.* at 23.) After the audit was conducted, the OCTC informed Dr. Marcus that the lack of informed consent forms made the data collected in the study unusable. (*Id.*)

Plaintiff also contends that she reported Dr. Marcus's violations to Dr. Julian Nussbaum, the Director of the Ophthalmology Department, and Lori Mipro, the Department of Ophthalmology Administrator, as early as October 8, 2004. (Pl. Dep. at 144; Aff. of Pl. ¶ 22.) In response to the concerns raised by Plaintiff, Dr. Nussbaum organized a weekly obligatory meeting with him and all of Dr. Marcus's staff to discuss these issues. (Aff. of Pl. ¶ 22.)

Throughout Plaintiff's tenure at MCG, Dr. Marcus contends that he had no knowledge of Plaintiff's various allegations against him. (Aff. of Marcus ¶¶ 40-44; Marcus Dep. Vol. I at 52, 78; Vol. II. at 31-32, 85.) Dr. Marcus did not become aware of Plaintiff's accusations until December 2004. (Aff. of Marcus ¶ 40.)

iv. Plaintiff's Working Relationship with Dr. Marcus

By both Plaintiff and Dr. Marcus's accounts, the working relationship between Plaintiff and Dr. Marcus was strained. In Marcus's view, Plaintiff displayed behavior that was bizarre, unprofessional, and unproductive. (Marcus Dep. at 68-72.) Plaintiff was ineffective and unproductive in her job because she would "split hairs" and "obsess about irrelevant details." (Marcus Dep. at 70-71, 86.)

Plaintiff would interrupt Dr. Marcus and Dr. Hendrickson during patient appointments. (Marcus Dep. at 68-69; Pl. Dep. at 235-36.) While Plaintiff was

permitted to interrupt Dr. Marcus for emergency situations, Plaintiff would interrupt Dr. Marcus with trivial administrative problems. (Marcus Dep. at 69.)

Dr. Marcus found that Plaintiff improperly handled a variety of administrative tasks including: incorrectly handling a laser repair job (Pl. Dep. Ex. 12); bringing boxes into the library (Pl. Dep. at 139); and incorrectly ordering offices supplies. (*Id.*) Drs. Marcus and Henrickson met with Plaintiff to discuss her shortcomings in these administrative tasks. (Pl. Dep. at 139, 141-43, 235-37.)

On October 14, 2004, Plaintiff wrote Dr. Marcus to explain that she could not handle sharing a work space with Melanie, a co-worker. (Pl. Dep. at 132-34, Pl. Dep. Ex. 11.) Specifically, Plaintiff complained that she could not handle Melanie's "strong laghes [sic]" and her multiple intercom pages. (*Id.*) Both Dr. Marcus and Dr. Hendrickson found her reaction to sharing workspace to be inappropriate. (Dep. of Marcus at 68-69; Aff. of Marcus ¶¶ 30-31.)

Likewise, Plaintiff admits she was unhappy in her position in the Department of Ophthalmology. (Pl. Dep. at 128.) In fact, in October 2004, Plaintiff sought out other forms of employment. (*Id.*) Plaintiff's need to care for her daughter was related to her desire to look for another job. On October 19, 2004, Plaintiff wrote an email to Dr. Marcus, asking to be removed as a technician on the Genetech study because she did not want to leave her daughter alone. (Pl. Dep. Ex. 15.) Plaintiff suggested that if it was not possible

to remove her from the study, she would start applying to other jobs. (*Id.*)

On October 20, 2004, Plaintiff wrote to Dr. Marcus that she was very stressed out and needed to take a day off. (Pl. Dep. Ex. 16.) In her email, she suggests that her daughter is ill and needs a lot of attention, care, and "mommy made food." (*Id.*) Plaintiff reiterates that she is not the right person for this job. (*Id.*)

On November 4, 2004, Plaintiff wrote an email to Dr. Nussbaum, informing him that she was beginning to apply for other positions at MCG. (Pl. Dep. Ex. 38.) Plaintiff requested that she be able to list Dr. Nussbaum as a reference. (*Id.*) Plaintiff cites her reasons for wanting to leave the employ of Dr. Marcus as "terrible disorganization, very bad salary, and it will require[d] a lot of time and patient (sic) to fix so many things pending over years." (*Id.*)

v. MCG's Termination of Plaintiff

In Dr. Marcus's view, Plaintiff was terminated as a result of her behavior in scheduling a pre-enrollment visit for a clinical trial. In mid November of 2004, Dr. Marcus expected to have a visit from Theragenics, a sponsor for some of the Department's clinical trials, to determine whether the Department would be an appropriate place for a clinical trial involving the use of radiation. (Aff. of Marcus ¶¶ 33-37.) Plaintiff believed that the Theragenics visit could threaten the safety of the patients and staff and she

informed individuals in the hospital that she would not allow the visit to take place. (*Id.*) Because of Plaintiff's strong opposition to the Theragenics visit, Benson had to take charge of organizing the visit. (Pl. Dep. Ex. 20.)

On November 18, 2004, Dr. Marcus and Dr. Hendrickson decided that Plaintiff was failing in her job as a research coordinator. As a result, on November 19, 2004, Mipro, the Department Administrator, orally notified Plaintiff that her employment would be terminated effective on November 22, 2004. Plaintiff recalls that Mipro told her she was fired "because you opened your mouth." (Pl. Dep. at 167-68.) Mipro provided Plaintiff with formal notice of discharge on November 19, 2004. (Pl. Dep. Ex. 23.) According to the dismissal notice, Plaintiff was terminated because of her failure to satisfactorily complete the six-month provisional period.[2] (*Id.*)

B. Plaintiff's Post-Termination Speech

Shortly after Plaintiff's termination, she began making complaints to various MCG officials about Dr. Marcus's clinical trials. On November 23, 2004, Plaintiff sent an email to Dr. Nussbaum, requesting that

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[2] Plaintiff contends that she was not a probationary employee because she had been working in various laboratories and departments at MCG since October 2001. (Aff. of Pl. ¶ 8.) Defendants respond that Plaintiff's allegation is completely unsupported by the evidence. (Defs.' Reply Br. at 2.)

MCG conduct audits of Dr. Marcus's clinical trials. (Pl. Dep. Ex. 32.) Specifically, she alleged that during her employment, she had observed research misconduct, irresponsible conductance of clinical trials, and negligence. (*Id.*) In fact, before sending this email to Dr. Nussbaum, she sent drafts of this email to various employees of MCG so that they could proofread it for her. (Pl. Dep. Exs. 26-30.) In response, Dr. Nussman told Plaintiff that he forwarded her email to the appropriate individuals for follow up investigation. (Pl. Dep. Ex. 32.)

On January 4, 2005, Solomon Walker, Director of the AA/EEO Office at MCG, informed Plaintiff that Human Resources would be handling her complaints since they were employment related. (Pl. Dep. Ex. 43.) On January 28, 2005, the Director of Human Resources, Susan A. Norton, informed Plaintiff that she was fired, not in retaliation for making allegations against Dr. Marcus, but for the failure to satisfactorily complete the provisional period. (Pl. Dep. Ex. 33.)

Although Human Resources had determined that Plaintiff was not fired in retaliation for making allegations against Dr. Marcus, in December 2004, Plaintiff began to communicate via email with Andrew Newton, the Vice President of Legal Affairs at MCG. (Pl. Dep. Ex. 49.) In her emails, Plaintiff began to voice various allegations not only against Dr. Marcus, but also Drs. Mellor and Munn, with whom she had worked previously. (Pl. Dep. Ex. 39.) Plaintiff believed she had witnessed "a pattern of research

misconduct and wrongdoing in clinical trials over a ten year period and MCG's willingness to ignore it." (Aff. of Pl. ¶ 4.) During this time, Plaintiff made extreme allegations such as: that MCG was embezzling money to support terrorist operations; that MCG employees filed false bankruptcies to launder money; that MCG had orchestrated physical attacks on her daughter and had attempted to intimidate her; that MCG was tapping her phone calls in violation of the Patriot Act; and that MCG bribed her former attorney to botch her case. (Pl. Dep. at 317-18, 344-45, 431-38.) In many of these emails, Plaintiff refers to "clues" that, to her mind, demonstrate various wrongdoing by officials at MCG; however, these "clues" do not present specific evidence.[3] (Pl. Ex. 43, 46-47, 50-52, 57-58, 67, 69, 72, 77.)

Plaintiff also told both Dr. Rhan, the President of MCG, and Newton that unspecified officials at MCG were interfering with the hiring process to prevent her from getting a new position with MCG. (Pl. Dep. Ex. 53.) Newton repeatedly asked her to provide him with specific evidence that such retaliation had occurred, but Plaintiff did not do so. (*Id.*)

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[3] For example, Plaintiff provided Newton with a greeting card that she had given to a former employer in 2002. Plaintiff put this card into a plastic bag to preserve any fingerprints for testing. Plaintiff did not explain how this greeting card demonstrated any wrongdoing by Dr. Marcus or any of her former employers at MCG. (Pl. Dep. at 284-88; Ex. 44.)

Plaintiff also asked that both Newton and Dr. Rhan place her in a position at MCG with at least two years' job security. Newton explained to Plaintiff that she was certainly welcome to apply for any jobs for which she was qualified, but that Dr. Rhan and Newton were not willing to interfere with the hiring process of individual departments and laboratories. (*Id.*)

Beginning in the summer of 2006, Plaintiff began to contact federal agencies and organizations to inform them of the alleged wrongdoing occurring at MCG. On July 20, 2006, Plaintiff contacted the FBI believing that MCG was involved in orchestrating a physical attack on her daughter. (Pl. Dep. Ex. 80.) She asked the FBI to put her in the witness protection program because she was afraid MCG was trying to harm her. (Pl. Dep. Ex. 91.) On July 26, 2006, Plaintiff sent a letter to the Honorable Dudley H. Bowen, Jr., United States District Judge, informing him of wrongdoing by MCG. (*Id.*) Plaintiff continued to contact a variety of federal agencies through the spring of 2007, including: the Internal Revenue Service; the Department of Health and Human Services; the U.S. Office of the Director of National Intelligence; the Securities and Exchange Commission; the Department of Justice; the Department of Homeland Security; the Veterans Administration, the Drug Enforcement Agency; the Department of Education; and the U.S. Joint Commission. (Pl. Dep. Exs. 81, 82, 85, 86, 89, 90; Howard Dep. at 58-62, 66-67.)

Plaintiff claims that she has applied for over 130 jobs at MCG for which she was qualified, but has not been offered a position. (Aff. of Pl. ¶ 30.) Plaintiff does not identify the specific jobs for which she applied. Plaintiff stopped applying for MCG jobs in late summer of 2005. (*Id.*)

Plaintiff contends that she was not given a job in retaliation for her post-termination speech to various MCG officials as well as to federal and state agencies. Plaintiff states that "I am qualified for many of the positions for which I applied at MCG following my termination, and the failure to be offered a single job at MCG is unquestionably retaliatory for my whistle-blowing activities while employed at MCG and following my termination." (Aff. of Pl. ¶ 32.)

II. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate when there are no genuine issues of fact and the movant is entitled to summary judgment as a matter of law. Fed. R. Civ. P. 56(c). The purpose of the summary judgment rule is to dispose of unsupported claims or defenses which, as a matter of law, raise no genuine issues of material fact suitable for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). In considering a motion for summary judgment, all facts and reasonable inferences are to be construed in favor of the nonmoving party. *Hogan v. Allstate Ins. Co.*, 361 F.3d 621, 625 (11th Cir. 2004). The party opposed to the summary judgment motion, however, "may not rest

upon the mere allegations or denials in its pleadings. Rather, its responses . . . must set forth specific facts showing that there is a genuine issue for trial." *Walker v. Darby*, 911 F.2d 1573, 1576-77 (11th Cir. 1990). Summary judgment is not appropriate "if the dispute about a material fact is 'genuine,' that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In response to Defendants' motion for summary judgment, the Clerk issued a *Griffith*[4] notice on May 12, 2008. (Doc. no. 52.)

III. DISCUSSION

In this case, Plaintiff contends that her First Amendment retaliation claim has two parts. First, Plaintiff contends that Defendants terminated her in retaliation for voicing her concerns about Dr. Marcus's clinical trials. Second, Plaintiff contends that MCG refused to hire her for any of the over 130 jobs for which she applied and was qualified in retaliation for the complaints she made after she was terminated.

It is well established that government regulation of a public employee's speech is different from government regulation of the speech of its citizens. *Boyce v. Andrew*, 510 F.3d 1333, 1342 (11th Cir. 2007)

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[4] *Griffith v. Wainwright*, 772 F.2d 822, 825 (11th Cir. 1985) (per curiam).

(*citing Connick v. Meyers,* 461 U.S. 138, 140 (1983); *Pickering v. Board of Educ.,* 391 U.S. 563 (1968)). Thus, these two types of speech warrant different analysis. The Court will first examine Plaintiff's speech as a public employee and then turn to Plaintiff's speech as a citizen, that is, post-termination.

A. Plaintiff's Claim as a Public Employee

Plaintiff claims that Defendants terminated her employment in retaliation for her allegations against Dr. Marcus in violation of § 1983. When a citizen enters government service, the citizen "must accept certain limitations on his or her freedom." *Garcetti v. Ceballos,* 547 U.S. 410, 419 (2006). When the government is acting as an employer, it is afforded broad discretion in its employment decisions. *Boyce,* 510 F.3d at 1341. Like private employers, government employers "need a significant degree of control over their employee's words and actions; without it, there would be little chance for the efficient provision of public services." *Garcetti,* 547 U.S. at 418. Thus, the Supreme Court has restricted the protections of the First Amendment afforded to government employees. *Boyce,* 510 F.3d at 1342.

In the decisions of *Connick v. Meyer* and *Pickering* the Court established that for government employee speech to be protected by the First Amendment, the employee must have (1) spoken as a citizen, and (2) addressed matters of public concern. *Boyce,* 510 F.3d at 1341. The Supreme Court later

clarified its precedent by holding that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." *Garcetti,* 547 U.S. at 421; *see also Boyce,* 510 F.3d at 1342-43 (If an employee speaks pursuant to official duties, there is no constitutional protection . . .).

Following *Garcetti,* the Eleventh Circuit has instructed district courts to determine first whether the employee spoke pursuant to her official duties. *Boyce,* 510 F.3d at 1342-43. If the government employee was speaking pursuant to her official duties, she is speaking as an employee and not a citizen and her retaliation claim fails.

In the instant case, the Court concludes that Plaintiff's speech is not constitutionally protected because she spoke as a government employee and not as a citizen. In *Garcetti,* the Supreme Court held that the deputy district attorney was not speaking as a citizen when he wrote a memo recommending that a case be dismissed, and was subsequently subjected to a series of retaliatory employment actions. The Court found that the controlling factor was that the deputy district attorney's speech was made pursuant to his duties. *Id.* at 421. Indeed, the Court wrote:

> Ceballos wrote his disposition memo because that is part of what he, as a calendar deputy, was employed to do. It is immaterial whether

> he experienced some personal gratification from writing the memo; his First Amendment rights do not depend on his job satisfaction.
>
> *Id.*

The Eleventh Circuit decision in *Battle v. Board of Regents,* 468 F.3d 755 (11th Cir. 2006) is instructive on this point. In *Battle,* the plaintiff worked in the Office of Financial Aid and Veteran Affairs at Fort Valley State University. The plaintiff admitted she had a "clear employment duty to ensure the accuracy and completeness of student files as well as to report any mismanagement or fraud she encountered in the student financial aid files." *Id.* at 761. During the course of her employment, the plaintiff discovered improprieties pointing to her supervisor's "fraudulent mishandling and mismanagement of Federal financial aid funds." *Id.* at 758. She confronted her employer, but he refused to address her concerns. *Id.* The plaintiff also provided the Fort Valley State University President with evidence of this fraud. *Id.* According to the plaintiff, she was subjected to retaliation for bringing these concerns to light.

The Eleventh Circuit affirmed summary judgment for the defendants. The court held that "because the First Amendment protects speech on matters of public concern made by a government employee speaking as a citizen, not as an employee fulfilling official responsibilities, Plaintiff's retaliation claim must fail." *Id.* at 761.

Similarly, Plaintiff's speech in this case was made pursuant to her official duties while employed at MCG. Throughout the course of her employment, Plaintiff made complaints to Dr. Marcus and Benson, to Dr. Nussbaum and Mipro, as well as to the OCTC. Specifically, she identified problems in Dr. Marcus's studies related to: inadequacies in the consent forms given to study participants; non-compliance in maintaining regulatory folders; questionable budgets and serious accounting issues, including the failure to report bonuses and incentives for the studies; and the failure to report severe adverse events.

Plaintiff's written job description makes clear that she was hired to make sure that data entry for these clinical trials was performed in compliance with various oversight agencies and organizations and sponsor required guidelines. She was to maintain the regulatory folders and ensure that the proper consent forms were obtained. She was also hired to track and report all budgets and spending for all accounts. These duties align specifically with the complaints she made about Dr. Marcus's clinical trials.

Moreover, Plaintiff admits that her allegations were made as part of her duties, stating in her deposition that "Absolutely, you have to report." (Pl. Dep. at 204-05.) Plaintiff concedes that it was her duty to assure "regulatory compliance" with Dr. Marcus's clinical trials. (*Id.* at 87.) Plaintiff also states that it was her duty to protect humans involved in Dr. Marcus's clinical trials, specifically, by reporting the

failure to obtain informed consent as well as reporting SAEs.

Plaintiff argues that because she reported violations in the Sleep Apnea Study, a trial that was completed prior to her hire date, her speech was made outside of her duty to ensure compliance with record keeping and reporting requirements. However, Plaintiff's written job description denotes that Plaintiff is responsible for "coordinating clinical trials" but does not specify the specific trials for which Plaintiff was responsible. Further, at the time of Plaintiff's report to OCTC, the data of Dr. Marcus's Sleep Apnea study was still being analyzed. (Dep. of Taylor, Ex. 5.) Thus, the clinical study was still ongoing when Plaintiff assumed her duties.

Plaintiff reported to the OCTC that several informed consent forms were missing, in violation of data entry regulations. As a result of Plaintiff's reports, the data of Dr. Marcus's study could not be validated, and his study was not submitted for publication. Plaintiff fulfilled her written job responsibility by ensuring that the Sleep Apnea's data entry was in compliance with federal guidelines.

Plaintiff's own admissions make it apparent to this Court that her position at MCG required her to ensure that Dr. Marcus's studies were completed in compliance with all federal regulations, that all accounting was proper, and to ensure that humans were protected. Like the plaintiff in *Battle,* Plaintiff made allegations against Dr. Marcus to fulfill her duties to

MCG. Plaintiff's speech made while she was an employee at MCG is not protected by the First Amendment and Plaintiff's retaliation claims fails.[5]

B. Plaintiff's Speech as a Citizen

The next aspect of Plaintiff's retaliation claim concerns her speech after she was terminated by MCG. Plaintiff contends that after she was fired, she continued to make allegations against Dr. Marcus, both internally to MCG as well as to public agencies. In retaliation for making these allegations, Plaintiff contends that MCG refused to hire her for any of the 130 jobs for which she applied.[6]

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[5] Because the Court has determined that Plaintiff's speech was made pursuant to her official duties, Plaintiff was speaking as an employee, not a citizen on a matter of public concern. The Court notes, however, that Plaintiff is also not able to demonstrate that her speech played a substantial part in her subsequent termination. *See Boyce*, 510 F.3d at 1342-43. Dr. Marcus testifies that he was unaware that Plaintiff was making allegations against him until after her termination. Without specific knowledge that Dr. Marcus was aware of her speech, her retaliation claim would fail. *See King v. Augusta*, 2008 WL 268913, * 8 (S.D. Ga. January 29, 2008) ("At a minimum, a plaintiff must generally establish that the employer was actually aware of the protected expression at the time it took the adverse employment action.").

[6] It appears that Plaintiff also argues that MCG's refusal to hire her for any of these positions was in retaliation for her "whistleblowing activities" while she was an employee at MCG. This claim fails as the Court has already determined that this speech was made pursuant to her official job duties and is not protected under the First Amendment.

Because Plaintiff was acting as a private citizen after November 22, 2004, her post-termination speech is provided more protection. Indeed, the Eleventh Circuit has explained that a private citizen is entitled to *at least* as much protection against retaliation as a public employee. *Bennett v. Hendrix,* 423 F.3d 1247, 1252 (11th Cir. 2005) (emphasis added). Indeed, a "public employee . . . may be required to tolerate more than average citizens." *Id.* at 1253 (*citing Thaddeus-X v. Blatter,* 175 F.3d 378, 398 (6th Cir. 1999).

In order for a private citizen to prove a claim for First Amendment retaliation, a plaintiff must show (1) that the speech was constitutionally protected; (2) the plaintiff suffered an adverse action that would likely deter a person of ordinary firmness from engaging in such speech; and (3) there is a causal relationship between the retaliatory action and the protected speech. *Smith v. Mosley,* 532 F.3d 1270, 1276 (11th Cir. 2008); *see also Bennett v. Hendrix,* 423 F.3d 1247 (establishing the elements of a citizen's retaliation claim).

Here, it is uncontested that Plaintiff's speech in reporting alleged wrongdoing by a government entity is constitutionally protected. Further, it has been established that not being rehired for a position is a retaliatory act that would chill a person of ordinary firmness. *See Washington v. Bellsouth Commc'ns,* 285 Fed. Appx. 597, 601 (11th Cir. 2008) (*citing Burlington N. & Sante Fe Ry. Co. v. White,* 548 U.S. 53, 68 (2006)); *Bennett,* 423 F.3d at 1253. Plaintiff's claim fails, however, because she is unable to establish a

causal connection between her protected speech and MCG's failure to hire her for any of the 130 jobs to which she applied.

In the Title VII employment context, the Eleventh Circuit has provided some guidance for district courts to determine whether a plaintiff has established a causal connection for a retaliation claim.[7] To show that the adverse action was causally related to the employee's protected expression, Plaintiff must prove that "the protected activity and the adverse action are not completely unrelated." *Wideman v. Wal-Mart Stores, Inc.*, 141 F.3d 1453, 1454 (11th Cir. 1998).

The causal link is interpreted broadly, but the Plaintiff must prove more than the fact that the adverse action occurred sometime after the protected speech. *Davis v. Coca-Cola Bottling Co. Consol.*, 516 F.3d 955, 978 (11th Cir. 2008) ("merely showing that the alleged adverse action occurred sometime after the protected expression does not establish the causation element – for temporal progression to be enough, the events must be very close in proximity"); *see also O'Bryant v. Finch*, 2008 WL 4372867, * 7 (N.D. Fl. Sept. 24, 2008) ("A causal connection between the protected conduct and the allegedly retaliatory act *may*

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[7] While the elements for a Title VII retaliation claim are not identical, both causes of action require a causal connection between the protected activity and the retaliatory action. *See Adams v. Cobb County Sch. Dist.*, 242 Fed. Appx. 616, 619 (11th Cir. 2007).

be alleged by a chronology of events that create a plausible inference of retaliation.")

The Eleventh Circuit has cautioned, however, that "conclusory allegations without specific supporting facts have no probative value" and that "in the absence of any other evidence of causation," a short period of time between the protected activity and the adverse employment action is insufficient to create a jury issue on causation. *Taylor v. Nix,* 240 Fed. Appx. 830, 836 (11th Cir. 2007). The Third Circuit has instructed district courts that in the absence of "an unusually suggestive temporal proximity" showing retaliation or a "pattern of antagonism coupled with timing to establish a causal link," a plaintiff must show that "from evidence gleaned from the record as a whole, the trier of fact should infer causation." *Queer v. Westmoreland County,* 2008 WL 4636497, * 3 (3rd Cir. Oct. 20, 2008).

The Court notes that Plaintiff admits she stopped applying for jobs in late summer of 2005. Plaintiff did not begin making reports to federal agencies such as the FBI, the IRS, the FDA, and the DOJ until the spring and summer of 2006. Thus, Plaintiff's reports to outside agencies absolutely cannot be related to MCG's failure to rehire her, as they occurred after she ceased her job applications.

The Court recognizes, however, that Plaintiff alleges that she was applying for jobs during the same period of time she was making internal complaints to MCG officials. In fact, Plaintiff contends

that she applied for over 130 jobs after she was fired. Plaintiff has not provided this Court with any evidence of the specific jobs for which she applied. Plaintiff does not demonstrate how she was qualified for the jobs she was not awarded; only making the blanket statement that she is qualified for many of these unnamed positions at MCG. (Aff. of Pl. ¶ 32.) Plaintiff does not tell the Court the dates she applied for these jobs. Plaintiff does not present evidence of a single job application.

In short, Plaintiff has not demonstrated that there is any sort of temporal connection between her allegations made to various MCG officials and her failure to receive another job at MCG. Such a vague conclusory allegation of post-termination retaliation is the very definition of the "scintilla of evidence" which does not survive summary judgment. *See Anderson v. Liberty Lobby,* 477 U.S. 242, 252 (1986). Thus, Plaintiff has simply not provided this Court with specific evidence of post-termination retaliation which would allow her claim to survive summary judgment.

IV. CONCLUSION

Upon the foregoing, the Court finds that Defendants are entitled to summary judgment. Because the Court grants summary judgment on Plaintiff's § 1983 First Amendment retaliation claim, the Court declines to exercise supplemental jurisdiction over

Plaintiff's Georgia Whistleblower Claim, O.C.G.A § 45-1-4. *See* 28 U.S.C. § 1367(c)(3).

Accordingly, Defendants' Motion for Summary Judgment (Doc. no. 43) is **GRANTED.** The Clerk is **DIRECTED** to enter **FINAL JUDGMENT** in favor of Defendants. The Clerk shall terminate all deadlines and motions, and **CLOSE** the case.

ORDER ENTERED at Augusta, Georgia, this 12th day of February, 2009.

/s/ J. Randal Hall
HONORABLE J. RANDALL HALL
UNITED STATES DISTRICT JUDGE